1982

Mavor Jean Carnes v. Cliff Carnes : Brief of Appellant

Utah Supreme Court

Edward K. Brass; Attorney for Appellant;
Paul H. Proctor; Dart & Stegall; Attorneys for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

MAYOR JEAN CARNES,	:	
Plaintiff and Respondent,	:	
vs.	:	Case No. 18370
CLIFF CARNES,	:	
Defendant and Appellant.	:	

BRIEF OF APPELLANT

Appeal from a summary judgment granted by the Honorable David B. Dee, Third District Judge, on March 5, 1982.

EDWARD K. BRASS
Attorney for Appellant
321 South Sixth East
Salt Lake City, Utah 84102
Telephone (801) 322-5678

PAUL H. PROCTOR
DART & STEGALL
Attorneys for Respondent
430 Ten Broadway Bldg.
Ten West Third South
Salt Lake City, Utah 84101
Telephone (801) 521-6383

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DART & STEGALL
Attorneys for Respondent
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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a summary judgment granted in the Third District Court.

DISPOSITION IN THE LOWER COURT

The respondent brought an action upon a foreign judgment against the appellant in the Third District Court. The appellant contested the action. Respondent first filed a motion for judgment on the pleadings which was in part denied. Later, on March 5, 1982, the court granted the respondent's "motion for judgment." On April 5, 1982, the appellant filed his notice of appeal.

RELIEF SOUGHT ON APPEAL

The appellant seeks a reversal of the summary judgment and a remand for trial on the disputed factual issues.

STATEMENT OF FACTS

The case began on April 28, 1981, when the respondent filed a complaint against the appellant based upon a foreign judgment. In the complaint the respondent alleged that the Florida court which entered judgment on November 10, 1980, had acquired personal jurisdiction over the appellant by means of personal service (R-3, paragraph #4). The appellant filed an answer which, among other allegations, denied that he had been served and affirmatively alleged that the Florida court lacked jurisdiction to enter the judgment.

On August 25, 1981, the respondent filed a motion for judgment on the pleadings (R-17). The Court did not grant the motion because no proof was presented that the appellant had in fact been served in the Florida action (R-21-22).

On January 20, 1982, the respondent filed what she styled as a "motion for judgment" pursuant to Rule 12C of the Utah Rules of Civil Procedure, again claiming that the appellant had been properly served in the Florida action (R-23). Attached to the motion was a return of service which purports to show that the appellant was personally served at 1554 West 8155 South #73 on October 22, 1980 with the process which led to the judgment (R-26). However, an examination of the exhibit shows it was not prepared until May 22, 1981, six months after the judgment, and according to the Clerk's stamp in the left corner, was not filed in Florida

until November 20, 1981, some one year and ten days after the entry of judgment and some two months after the Utah court ruled such a return would be a prerequisite for any judgment.

The Court which heard the "motion for judgment" ordered that it be continued without date to enable the respondent to secure additional proof of service (R-30, 36). Respondent then filed an affidavit from the same deputy who prepared the May 22, 1981 return, only in this affidavit the deputy claimed to have served the appellant at his work address, 4950 South 8400 West, Salt Lake City, Utah (R-32, 33). The Court then gave the appellant five days to respond to the new affidavit (R-35).

The appellant then filed his own affidavit alleging that he had never resided at 1554 West 8155 South #73, the first place at which he was alleged to have been served, that he had never been served at work and that he had never been served at all (R-46). The Court then considered memoranda submitted by the parties (R-42, 48, 56) and entered judgment on March 5, 1982 (R-59).

ARGUMENT

SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED

Summary judgment was inappropriate in this case both as a matter of fact and and as a matter of law. A clear issue exists

as to the central fact in the case, whether the appellant was served. In addition, under Florida law no judgment can be entered without proof of service, yet here the proof was not prepared for six months after the entry of judgment and was not filed until more than a year later. However, before these factual and legal issues are explored in greater depth, it is first necessary to determine what type of judgment the court entered.

The determination of what type of judgment was entered is necessary because the respondent styled her motion only as a "motion for judgment" and the court's judgment did not clarify the type. The motion was made pursuant to Rule 12C, U.R.C.P., thus it apparently began as a motion for judgment on the pleadings. However, the court did not limit its inquiry to the pleadings but rather considered the return of service exhibit, the affidavit of the deputy who claimed to have made the service, and the affidavit of the defendant who denied service. Where the court considers matters outside of the pleadings on a motion made pursuant to Rule 12, "...the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56...," Rule 12, U.R.C.P., Strand v. Associated Students of U. of Utah, 561 P.2d 191, (Utah 1977). Therefore, it seems safe to conclude that the judgment which was entered was a summary judgment.

The principles which guide a court in determining whether to enter summary judgment are well known. "To sustain a summary judgment, the pleadings, evidence, admissions and inferences therefrom, viewed most favorably to the loser, must show that

there is no genuine issue of material fact and that the winner is entitled to judgment as a matter of law. Such showing must preclude, as a matter of law, all reasonable possibility that the loser could win if given a trial", Frederick May & Company v. Dunn, 13 U.2d 40, 368 P.2d 266 (1962). "...It takes only one sworn statement under oath to dispute the averments on the other side of the controversy and create an issue of fact...," Hollbrook Company v. Adams, 542 P.2d 191, 193 (Utah 1975). An application of these principles to the present appeal discloses one of the reasons summary judgment was inappropriate.

The respondent's evidence to support service may have been sufficient alone to preclude summary judgment. In September, 1981, the court told the respondent it would not grant judgment absent sufficient proof that the appellant was served. Curiously enough, in November, 1981, two months later and more than a year after the entry of judgment a return of service appeared for the first time in the Florida file. The return was ostensibly prepared by a Utah deputy sheriff six months after the entry of judgment and then was not filed for another six months. In it the deputy professes to have served the appellant at a certain residential address in western Salt Lake County. Later, when the court pressed the respondent for further proof of service, the same deputy filed an affidavit in which he claimed to have served the appellant at a completely different business address. These confused and odd facts offered in support of service are squarely opposed by the appellant's affidavit. In it, he claims to have never been served. He also states that he never lived at the residence where the

deputy first claimed to have served him and when the deputy changed his story to claim he served him at work, it turned out that the appellant was not at work that week. The appellant's "one sworn statement" created a clear material issue of fact, whether he was served, which should have prevented the lower court from entering summary judgment.

The materiality of the disputed fact cannot be questioned. It is fundamental that without service of process there can be no jurisdiction to enter a judgment, Shepherd v. Kelly, 2 Fla. 634 (1849). In Florida, where this particular judgment arose, the defendant is permitted to raise lack of appropriate service as a defense even where a valid sheriff's return has been filed provided that he bear the burden of persuading the court by clear and convincing evidence that service did not occur, McIntosh v. Webbeler, 106 So. 2d 195 (Fla. 1958). Thus the dispute presented by this appeal is "material."

Summary judgment was improper here not only because of the dispute as to the facts but as a matter of Florida law. As has been seen previously, the return of service on the Florida process was not created until some six months after the entry of judgment and was not filed for more than a year after the entry of judgment. Thus, at the time the judgment was entered proof of any kind that the appellant had been served did not even exist. In Klosenski v. Flaherty, 116 So. 2d 767 (Fla. 1959), the Court held that it was the service of the writ and not the sheriff's return which gave the court jurisdiction but at the same time it held, "the court

has not jurisdiction to proceed further in the cause unless and until proof of valid service has been made," id., at 769, and concluded that the action would lie dormant until proper proof was made. Therefore, in the present case, under unequivocal Florida law, the court which entered the judgment "lacked jurisdiction to proceed in the cause" at the time judgment was entered. Thus the judgment in Florida was void as a matter of law and was equally void when suit was brought upon it here in Utah.

CONCLUSION

Summary judgment was inappropriate as a matter of fact and as a matter of law because the fact of service was in dispute and the Florida court lacked jurisdiction to enter a judgment. The judgment should be reversed and the case remanded to the District Court.

DATED this 23 day of June, 1982.

Respectfully submitted,

EDWARD K. BRASS
Attorney for Appellant

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to Paul H. Proctor, 430 Ten Broadway Building, Ten West Third South, Salt Lake City, Utah, 84101, this 23 day of June, 1982.

Edward M Brooks